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538-982—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1146

PHILIP CHARLES TESTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the failure of the court of appeals to dispose of his appeal from a civil contempt determination within 30 days requires vacation of the grand jury subpoena, the immunity order, and the order of confinement; (2) that the immunity order was improper (a) because the judge who issued it should have recused himself, (b) because a government misrepresentation as to when an immunity order would be requested deprived petitioner's counsel of time to prepare for the immunity hearing, (c) because the judge did not permit him to raise certain objections at that hearing, and (d) because the government did not demonstrate sufficient public interest in petitioner's testimony and the likelihood that he would

refuse to testify; (3) that petitioner's confinement for refusal to testify was precluded by his confinement ten years previously for refusal to testify before a grand jury investigating different matters; and (4) that the questions asked in the grand jury hearing were tainted by illegal wire interceptions which occurred more than seven years previously.

Petitioner, an immunized witness before a special grand jury, was ordered confined for civil contempt by the United States District Court for the Eastern District of Pennsylvania for refusing without just cause to comply with an order of the court to testify, as provided by 28 U.S.C. 1826(a). The period of confinement was to last until such time as petitioner is willing to testify, such period not to exceed the life of the grand jury, and in no event for longer than 18 months. The court of appeals affirmed (Pet. 105–125).

The relevant facts are set forth in the opinion of the court of appeals (Pet. 106, 107–108). Briefly, they show that on August 22, 1973, petitioner was called as a witness before a special grand jury sitting in Philadelphia, Pennsylvania; he was asked questions concerning the grand jury's investigation into credit extortion, interstate racketeering, illegal gambling, income tax evasion, and distribution of illegal drugs; he refused to answer these inquiries, invoking his privilege against self-incrimination and the Fourth Amendment (Transcript of August 22, 1973, pp. 5–6, 28–35). Petitioner was then immediately brought before the emergency judge for that week, United States District Judge Louis C. Bechtle, who granted the government's request that petitioner be given use im-

munity pursuant to 18 U.S.C. 6002 and 6003. Petitioner again refused to testify on constitutional grounds, and a hearing was held before United States District Judge John Morgan Davis on the government's petition for an order holding petitioner in civil contempt. The hearing began on September 5, 1973, and ran intermittently until September 12, 1973. On that date, after finding that there was no just cause for petitioner's refusal to testify, Judge Davis ordered petitioner to return to the grand jury and testify. Petitioner returned to the grand jury, but he still refused to testify, and Judge Davis thereupon ordered him confined for civil contempt (Transcript of September 12, 1973, pp. 136–142, 166–167).

1. Petitioner contends that the failure of the court of appeals to dispose of his appeal from the order of confinement for civil contempt within 30 days requires vacation of the grand jury subpoena, the immunity order, and the order of confinement (Pet. 46–61).

The order of confinement was issued on September 12, 1973, and the notice of appeal was filed on September 13, 1973. The court of appeals issued its opinion and judgment affirming the district court on October 25, 1973, twelve days after the expiration of the 30-day period. While 28 U.S.C. 1826(b) states that the appeal "shall be disposed of * * * not later than thirty days from the filing of such appeal," it does not indicate what happens if the court of appeals acts a few days beyond the 30-day period. Petitioner has cited nothing in the legislative history of the statute nor any case supporting the contention that failure to dispose of the appeal within 30 days automatically

vacates the order of confinement, much less the subpoena and the immunity order.

Charleston v. *United States*, 444 F. 2d 504 (C.A. 9), petition for certiorari dismissed, 404 U.S. 916 (cited by petitioner, Pet. 53), does not deal with the issue. Rather, the court there assumed that the 30-day limit was mandatory rather than directory and that it was constitutional, in deciding that a contempt conviction must be affirmed when there was not sufficient time to convene a court *en banc* (444 F. 2d at 506). *Reed* v. *United States*, 448 F. 2d 1276 (C.A. 9), merely relied on *Charleston*. Neither of these cases considered the effect of a failure to dispose of the appeal within 30 days. On the other hand, two circuits have decided appeals after the expiration of the 30 days, expressly noting that fact. *Beverly* v. *United States*, 468 F. 2d 732, 742 (C.A. 5); *In re Tierney*, 465 F. 2d 806, 809 (C.A. 5), certiorari denied *sub nom. Tierney* v. *United States*, 410 U.S. 914; *United States* v. *Doe*, 460 F. 2d 328, 332, n. 3 (C.A. 1), certiorari denied *sub nom. Popkin* v. *United States*, 411 U.S. 909. It was not suggested in these cases that the late decision might vitiate the order of confinement; such a drastic result would be inconsistent with the clear intent of Congress to permit district courts to confine witnesses who refuse to obey lawful orders to testify.

Moreover, petitioner has not suffered any prejudice from the delay by the court of appeals. Had the case been decided on time, petitioner would have passed those 12 days as he actually did pass them; the delay made no difference. "[D]elay in appeal is not truly

prejudicial except in case of reversal." *United States* v. *Cifarelli*, 401 F. 2d 512, 514 (C.A. 2), certiorari denied, 393 U.S. 987. Arguably, petitioner may have been entitled to release from confinement during the period of delay in excess of 30 days in the court of appeals. Any such claim has, of course, been mooted by the affirmance of the contempt adjudication.

2. Petitioner contends that the grant of immunity was improper for several reasons:

a. Petitioner's contention (Pet. 71–78) that Judge Bechtle should have recused himself from the immunity hearing was rejected in the opinion of the court of appeals, upon which we rely (Pet.108–114).[1]

b. Petitioner contends that he was deprived of his right to effective assistance of counsel at the immunity hearing by virtue of a misrepresentation by government counsel (Pet. 69–71, 78–79).

The day before the immunity hearing, the government attorney told petitioner's counsel that it would probably take weeks to obtain authorization for the immunity application from Washington. Actually, the authorization had been obtained in advance. The government attorney explained this misrepresentation

[1] The court of appeals correctly refused to adopt an inflexible rule requiring that a judge who has been a United States Attorney disqualify himself in all cases involving defendants who were subjects of prosecutions or investigations by the United States Attorney's office while he was in office. The petitioner did not allege that Judge Bechtle had any special interest in the outcome of this case. In any event, as the court noted, his function in issuing the immunity order was purely ministerial, so that any special interest he might have had in the proceedings could not have affected petitioner adversely (Pet. 108–114).

from the witness stand at the hearing before Judge Davis (Transcript of September 12, 1973, pp. 155-156):

> * * * I felt I could not tell you or your client that we had already received immunity because for three and one-half months the Federal Bureau of Investigation had a heck of a time finding Mr. Testa to serve the subpoena and, once we did serve the subpoena, I felt in my own mind that if he knew we had immunity [authorization], and the FBI agreed with me, he would not have shown up and we would have had a heck of a further time to find him. That is why I did not tell you that we had already received immunity [authorization].

Regardless of the propriety of this misrepresentation, petitioner has not demonstrated that he was prejudiced thereby. Petitioner was represented by counsel at the immunity hearing, even though this is not required. See *In re Kilgo,* 484 F. 2d 1215, 1221 (C.A. 4); *United States* v. *Handler,* 476 F. 2d 709, 714 (C.A. 2). Counsel's alleged lack of preparation for the immunity hearing did not prejudice petitioner, because the court's action in granting immunity is largely ministerial. *In re Kilgo, supra,* 484 F. 2d at 1221. A prospective witness' only interest at the immunity hearing is to assure himself that the order is an effective grant of immunity. This interest was satisfied when petitioner observed the court sign a valid order. In any event, petitioner was afforded the opportunity to challenge the propriety of his immunization at his

contempt hearing, and he was given a further opportunity to testify after the court ruled against him (Transcript of September 12, 1973, p. 136).[2] Therefore, government counsel's misrepresentation did not prejudice petitioner or taint the validity of the subsequent contempt proceedings.

c. Petitioner's contention (Pet. 62–68) that the immunity hearing was improper because the court did not permit him to litigate certain objections is without merit. The issue whether in a particular case 18 U.S.C. 2515 (the wire interception statute) provides just cause for a refusal to testify before a grand jury is not a proper subject of litigation at an immunity hearing. Cf. *Gelbard* v. *United States*, 408 U.S. 41. An immunity petition does not disclose the existence of wire interceptions or recite evidence derived therefrom; it is merely an assertion that the government desires to ask a witness questions. Moreover, petitioner was not prejudiced, since he fully litigated his Section 2515 claim at the contempt hearing and was given an additional opportunity to comply with the order to testify after the court made its ruling (Transcript of September 12, 1973, p. 136).

d. Petitioner contends that the immunity grant was improper because the government did not demonstrate the public interest in petitioner's testimony or the likelihood that he would not testify (Pet. 79–83).

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[2] Petitioner was not permitted to relitigate at the contempt hearing the issue whether Judge Bechtle should have recused himself. However, this issue was considered in the court of appeals.

18 U.S.C. 6003 provides that a United States Attorney may request an immunity order when "in his judgment" the testimony of the witness may be necessary to the public interest, and the individual has refused or is likely to refuse to testify on the basis of the Fifth Amendment. At the time the immunity application was authorized by the Assistant Attorney General, petitioner had not yet been called before the grand jury.[3] But when the court was asked to grant immunity, petitioner had already refused to testify (Transcript of August 22, 1973, pp. 22–23). As to the public interest requirement, the court found that the United States Attorney considered it to be in the public interest for petitioner to testify (Transcript of August 22, 1973, p. 23). The court may not review the United States Attorney's exercise of judgment as to what is in the public interest,[4] and the government is

[3] The United States Attorney could at that time reasonably have concluded that petitioner was likely to refuse to testify, since he had gone to prison in 1963, rather than testify. Furthermore, the government had unsuccessfully attempted to serve a grand jury subpoena on petitioner for almost three and one-half months before he was finally served (Transcript of September 12, 1973, p. 144). The U.S. Attorney could also conclude, based on his knowledge of matters to be presented to the grand jury, that petitioner's testimony would be necessary.

[4] In *United States* v. *Handler*, 476 F. 2d 709, 715 n. 7 (C.A. 2) (presumably the recent Second Circuit case mentioned at Pet. 644), the court asserted in dictum that a defendant has a "continuing right to petition the district court for release if * * * the public necessity that led to the grant of immunity and the order to testify should cease to exist." We do not doubt that in a proper case the court could ask the United States Attorney if in his judgment the public necessity had ceased to

not required to present evidence in support thereof. *In re Kilgo, supra,* 484 F. 2d at 1218–1219.[5]

3. Petitioner's contention (Pet. 84–85) that his imprisonment for refusal to testify before a grand jury in 1963 precludes his imprisonment for refusal to testify in 1973 is without merit. The events being investigated in 1973 were not the same as those being investigated in 1963 (Pet. 119 n. 5). However, even if the events were the same, and indeed, even if the questions were identical, the prohibition against double jeopardy would not prevent the civil contempt commitment from being continued or reimposed if petitioner continued to refuse to obey the court's order to testify. *Shillitani* v. *United States,* 384 U.S. 364, 371 n. 8.

4. Petitioner contends that he had just cause for refusal to testify because the government failed to prove that the questions were not tainted by admittedly illegal wire interceptions that had taken place seven years previously (Pet. 86–94).

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exist; but Congress has made it clear that it is the judgment of the United States Attorney, and not that of the court, which should prevail. See *In re Kilgo, supra,* 484 F. 2d at 1218—1219. The Second Circuit's dictum should not be interpreted as rejecting that principle.

[5] Petitioner's contention (Pet. 81) that the interest of Pennsylvania in preventing wire interceptions in the Commonwealth is superior to that of the United States in investigating organized crime is erroneous. It is well settled that agents of the United States engaged in governmental activities are immune from state regulation unless Congress affirmatively provides otherwise. *Mayo* v. *United States,* 319 U.S. 441, 448. Congress has not provided that the states may prohibit electronic surveillance by FBI agents or the use of evidence derived therefrom in federal courts. See 18 U.S.C. 2510 *et seq.*

The court of appeals correctly noted that there was sufficient evidence to support the district court's finding that there was an independent basis for the questions asked, and that the bare possibility of taint was insufficient to impugn that finding (Pet. 115–124).

Furthermore, regardless of the accuracy of the district court's factual finding, petitioner's claim on this issue must fail because 18 U.S.C. 3504(a)(3) precludes him from raising the question whether illegal wire interceptions which took place in 1965 taint questions relating to events which occurred more than five years later, in 1972 and 1973. The doubts expressed by the court of appeals about the constitutionality of this section (Pet. 117–120, n. 5) were resolved, at least in the grand jury setting here involved, by this Court in *United States* v. *Calandra,* No. 72–734, decided January 8, 1974. *Calandra* held that a witness summoned to appear and testify before a grand jury has no Fourth Amendment right to refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. Therefore, any claim which petitioner may have that he may not be compelled to answer questions based on illegal wire interceptions would have to be derived solely from the wire interception statute. See *United States* v. *Calandra,* slip op., p. 17 n. 11. However, by enacting Section 3504(a)(3), Congress has removed the right of petitioner to make a claim based upon these seven-year-old wire interceptions. Since petitioner has no constitutional right and no statutory right to chal-

lenge these old wire interceptions, he cannot raise them as just cause for his refusal to testify.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

[6] *Leary* v. *United States*, 395 U.S. 6 (cited at Pet. 89), is inapposite. In that case, Congress attempted to supply proof of a fact necessary for conviction by means of a presumption which the Court found to be irrational, and this was held to be a violation of the defendant's constitutional rights. In the instant case, Congress has simply taken away a statutory right to make a claim regarding evidence derived from wire interceptions.

CERTIORARI DENIED

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